

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

W. BYRON MITCHELL, JR. and
NANCY L. MITCHELL, individuals,,
Plaintiffs,
v.
TOTAL WEALTH MANAGEMENT
INC., a California corporation, et al.,
Defendants.

Case No.: 14cv1552-GPC-JLB

**ORDER FOLLOWING
STIPULATION BY PLAINTIFFS
AND DEFENDANTS MCNAMEE
AND SHOEMAKER TO STAY
ENTIRE ACTION**

[ECF No. 61]

Upon consideration of the Stipulation to Stay Entire Action submitted by Plaintiffs W. Byron Mitchell, Jr. and Nancy L. Mitchell and Defendants Nathan P. McNamee and Douglas D. Shoemaker (ECF No. 61), and upon good cause shown, the Court hereby STAYS this case in its entirety.

BACKGROUND

On February 6, 2015, Receiver Kristen A. Janulewicz (“Receiver”) filed a Notice of Pending Receivership regarding her appointment as a temporary Receiver for Total Wealth Management Inc. (“TWM”), and its subsidiaries and affiliates, including, but not limited to Atlus Capital Management, LLC, in *Securities and Exchange Commission v. Total*

1 *Wealth Management*, Case No. 15-cv-226-BAS (DHB) (the “*Receivership Action*”). (ECF
2 No. 49.)

3 On February 12, 2015, District Judge Cynthia Bashant (hereinafter “the
4 Receivership Court”) issued a preliminary injunction order, wherein she appointed the
5 Receiver as a permanent receiver. (*Receivership Action*, ECF No. 8.) The order appointing
6 a permanent receiver provides that:

7 [E]xcept by leave of this Court, during the pendency of this receivership, all
8 clients, investors, trust beneficiaries, note holders, creditors, claimants, lessors
9 and all other persons or entities seeking relief of any kind, in law or in equity,
10 from Defendant Total Wealth Management, Inc., or its subsidiaries or
11 affiliates . . . are hereby restrained and enjoined from, directly or indirectly,
12 with respect to these persons and entities . . . commencing, prosecuting,
continuing or enforcing any suit or proceeding (other than the present action
by the SEC or any other action by the government) against any of them

13 (*Id.* at 11.)

14 On February 17, 2015, this Court issued an Order to Show Cause (“OSC”) why this
15 action should not be stayed during the pendency of the receivership in the *Receivership*
16 *Action*. (ECF No. 51.) Defendants did not file a response. Following consideration of
17 Plaintiffs’ and the Receiver’s responses (ECF Nos. 52 & 53) and Plaintiffs’ reply brief
18 (ECF No. 54), the Court granted Plaintiffs’ request to proceed with their case against
19 McNamee, Shoemaker, Capital, and Financial Council (collectively, the
20 “McNamee/Shoemaker Defendants”). (ECF No. 57.) The Court denied Plaintiffs’ request
21 to conduct discovery against TWM, Altus Fund, Altus Capital, and Cooper for purposes of
22 pursuing their claims against the McNamee/Shoemaker Defendants, finding that discovery
23 falls within the Receivership Court’s order prohibiting investors from “prosecuting [or]
24 continuing . . . any suit or proceeding” against the defendants in the Receivership Action.
25 (*Id.* (citing *Receivership Action*, ECF No. 8 at 11).) The Court ordered the Receiver to
26 provide the Court with a status update in the *Receivership Action* on or by August 14, 2015.
27 (*Id.*)

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1 On March 12, 2015, the Receiver filed her Initial Report and Recommendations and
 2 Petitions for Instructions (“Initial Report”). (*Receivership Action*, ECF No. 17.) On
 3 August 7, 2015, the Receiver filed her First Interim Report and Petition for Further
 4 Instructions (the “Interim Report”). (*Id.*, ECF No. 43.) On August 13, 2015, the Receiver
 5 filed a Status Report with this Court, stating that “her investigation and asset recovery
 6 efforts are incomplete as of the date of [the] Status Report” and requesting that this Court
 7 continue its stay of this matter pending further updates from the Receiver. (ECF No. 58
 8 at 3.)

9 On September 2, 2015, Plaintiffs and the McNamee/Shoemaker Defendants filed a
 10 joint Stipulation to Stay Entire Action. (ECF No. 61.)

11 **DISCUSSION**

12 In their response to the Court’s OSC, the Mitchelll Plaintiffs asked this Court to
 13 allow them to proceed in litigating their claims against the McNamee/Shoemaker
 14 Defendants because the Mitchell Plaintiffs seek only the personal assets of these
 15 defendants, which they contend are not part of the Receivership *res.* (ECF No. 53 at 5-6.)
 16 Plaintiffs argued that they would suffer substantial injury if they are not allowed to proceed
 17 because they both are of advanced age and cannot retire until they recover their “nest egg”
 18 from Defendants. (*Id.*)

19 In her response, Receiver acknowledged that the preliminary injunction does not bar
 20 prosecution of litigation against the individual defendants in this case or entities not
 21 deemed to be Receivership Entities¹. (ECF No. 52 at 1.) However, for practical reasons,
 22 the Receiver recognized that the injunction “has significant implications” in connection
 23 with discovery, summary judgment, and potential judgment enforcement actions that may
 24 be undertaken against the individual and non-receivership defendants. (*Id.* at 4.)
 25 Additionally, the Receiver noted “that those defendants in this matter to whom the
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27 ¹ The Receiver defines the “Receivership Entities” as “Total Wealth Management, Inc. and its subsidiaries
 28 and affiliates, including but not limited to Altus Capital Management, LLC.” (ECF No. 52 at 1.)

litigation stay does not apply will almost certainly become subjects of the Receiver's investigation effort, and may themselves become defendants or relief defendants in the Receivership Case or in Receivership Asset recovery litigation brought by the Receiver." (*Id.* at 5.) The Receiver notes that, For this reason, failing to impose a blanket stay in this case could result in a "race to the courthouse," wherein some claimants may obtain relief first, to the detriment of other claimants. (*Id.*) The Receiver also argued that judicial economy militates against evaluating claims in a piecemeal fashion. (*Id.*) Accordingly, the Receiver did not object to the Court staying the action in its entirety pending resolution of the *Receivership Action*. (*Id.*)

Given that Plaintiffs and the Receiver agreed that the McNamee/Shoemaker Defendants are not currently part of the *Receivership Action*, finding speculative that the assets of the McNamee/Shoemaker Defendants may at some future date become part of the receivership *res*, and finding that Plaintiffs' interest in proceeding against the McNamee/Shoemaker Defendants outweighed the Receiver's interest in preventing any future, theoretical impact on the receivership *res*, the Court granted Plaintiffs' request to proceed with their case against the McNamee/Shoemaker Defendants. (*See* ECF No. 57 at 4-7.) With respect to a related case with identical defendants as in the instant case, *Bruce J. Staniforth v. Total Wealth Management, et al.*, Case No. 14-cv-1899-GPC-JLB (the "*Staniforth Action*"), the Court stayed the case in its entirety where Plaintiff did not object to the stay in the interest of judicial efficiency. (*See Staniforth Action*, ECF No. 43 at 3-6.)

"The power of a district court to impose a receivership or grant other forms of ancillary relief . . . derives from the inherent power of a court of equity to fashion effective relief." *SEC v. Wencke*, 622 F.2d 1363, 1369 (9th Cir. 1980). The "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). In order to effectuate this goal, the receivership court has authority to enjoin individuals from proceeding in another court in order to prevent interference with a

1 receivership action. *Wencke*, 622 F.2d at 1371-72 (upholding district court’s order staying
 2 state action by nonparties against receivership entities because “[t]here is a strong federal
 3 interest in insuring effective relief in SEC actions brought to enforce the securities laws”).

4 In the instant case the parties have asked this Court, as opposed to the Receivership
 5 Court, for permission to proceed. Plaintiffs and the McNamee/Shoemaker Defendants now
 6 jointly request that this action be stayed in its entirety. The Parties state that they believe
 7 that judicial economy and efficiency would be served by staying this action in its entirety
 8 pending further order of this Court.¹ (ECF No. 61 at 3.)

9 The Court allowed the instant case to proceed against the McNamee/Shoemaker
 10 Defendants after weighing the Plaintiffs’ interests in proceeding against the Receiver’s
 11 interest in preventing any future, theoretical impact on the receivership *res*. See *SEC v.*
 12 *Universal Fin.*, 760 F.2d 1034, 1037-38 (9th Cir. 1985) (considering, among other things,
 13 “whether the moving party will suffer substantial injury if not permitted to proceed” in
 14 deciding whether to except applicants from a blanket receivership stay) (quoting *SEC v.*
 15 *Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984)). Plaintiffs now support a stay of this
 16 action. In light of the Parties’ agreement that staying this action would serve judicial
 17 economy and efficiency, the court hereby **STAYS** this case in its entirety.

18 In so ruling, the Court is cognizant of the fact that the Receivership Court is more
 19 knowledgeable about the status of the SEC’s administrative action and the Receivership
 20 Action. Absent an intervening ruling from the Receivership Court that affects this case,
 21 the Court orders the Receiver to provide this Court with an update regarding the status of
 22 the *Receivership Action* on or before **December 1, 2015**.

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 26 ¹ The Parties also note that counsel for Plaintiff in the *Staniforth Action* has indicated that
 27 “he believes it would inequitable to allow the instant Action to proceed against the
 28 McNamee/Shoemaker Defendants while the *Staniforth Action* is stayed in its entirety” and
 that “he will be forced to either bring a motion to lift the stay in the *Staniforth Action* or
 seek to stay the instant Action.” (ECF No. 61 at 2-3.)


CONCLUSION

For the foregoing reasons, the Court:

1. **STAYS** this case in its entirety; and
2. **ORDERS** the Receiver to provide this Court with an update regarding the status of the *Receivership Action* on or by **December 1, 2015**.

IT IS SO ORDERED.

Dated: September 21, 2015


Hon. Gonzalo P. Curiel
United States District Judge